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Supreme Court, U.S.
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No. 98-1129

In The

Supreme Court of the United States

October Term, 1998

DIANE SANK,

Petitioner,

v.

NEW JERSEY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

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POINT I CONSTITUTIONAL VALIDITY OF *N.J.S.A.* 19:49-2 IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE AND IS PROPERLY BEFORE THIS COURT BECAUSE AS THE STATUTE IS WRITTEN AND APPLIED, IT IS REPUGNANT TO THE FEDERAL CONSTITUTION." 28 *U.S.C.* §1257(a).[1]

The Respondent, in Point I of his brief, submits to this Court that the constitutional issues presented by the Petitioner were disposed of by the New Jersey courts using State, not federal law, and are therefore not properly before this Court. *This is not so*. The New Jersey courts did not resolve the constitutional issues on independent and adequate State grounds. Instead the appellate court and State Supreme Court, both *without opinions*, denied the Petitioner's motions for emergent relief. Both motions argued that *N.J.S.A.* 19:49-2 was unconstitutional. At trial, the judge rejected the Petitioner's arguments regarding New Jersey's election laws and "any constitutionality issues." (July 28, 1998 Trial Transcript 16-13 to 15). The Petitioner was however, successful in creating a record at trial that substantiates her claim that the Respondents violated many election laws, the "sunshine laws," (Open Public Meetings Act), and that their injurious actions were prompted by *N.J.S.A.* 19:49-2.[2]

Petitioner seeks a Writ of Certiorari in order for this Court to determine whether *N.J.S.A.* 19:49-2 is unconstitutional as written and applied. The Petitioner lost in the Primary Election by 13 votes. She submits to this Court

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[1] The Petitioner incorporates herein by reference the points and arguments contained in her original brief requesting certiorari.

[2] It should be noted by this Court that the State appeared at trial but declined to participate in any of the trial proceedings. Furthermore, the State has not briefed any compelling State interest to uphold *N.J.S.A.* 19:49-2.

that *N.J.S.A.* 19:49-2 gave unfair advantage to her opponents and cost her the Primary and the right to run in the General Election. She further submits that there is no compelling State interest in this case that can withstand the "strict scrutiny" test warranted by this statute. *Anderson v. Celebrezze*, 460 *U.S.* 780 (1983); *Bullock v. Carter*, 405 *U.S.*134, 142-143 (1972).

N.J.S.A. 19:49-2 was designed to give the hierarchies of the major political parties the power to control who will be party candidates in Primary Elections -- and thus on the party's ticket in the General Election.[3]. It is in direct conflict with the statutory definition of a "Primary election,"[4] i.e., a Primary election is defined as "the procedure whereby the *members of a political party* . . . nominate candidates to be voted for at General elections . . . ." *N.J.S.A.* 19:1. (emphasis added).

The Petitioner submits that *N.J.S.A.* 19:49-2 is discriminatory.[5] It gives one individual in each county, i.e.,

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[3] It should be noted that in demographic areas where one party dominates, winning that party's Primary Election is tantamount to winning the General Election.

[4] See also *Motley v. Halpern*, 267 *N.J. Super.* 325 (Law Div. 1993), which notes that the Primary represents the first step of New Jersey's two stage election system, the process by which members of a political party select that party's candidates for the General Election. It is also "the major avenue of access to the General Election ballot" by which the party membership determines which candidates it chooses to present to the electorate in that General Election. See, *Primary Elections: The Real Party in Interest*, 27 *Rutgers L. Rev.* 298, 305 (1974)."

[5] "When ballot designations are meaningful in content and evenhanded in application, the advantage accruing to any candidate is . . . no more unfair than is the election system itself . . . It is when designations are bestowed selectively . . . that the sense of fair play is justifiably outraged. Such designations are discriminatory . . . ." Kelman, *Ballot Designation; Their Nature, Function, and Constitutionality*, 12 *Wayne L. Rev.* 756, 772 (1966).

the county campaign manager, uninhibited power to create first and second class Republican (and Democrat) candidates by giving first class candidates the column one, preferred position on the ballot along with the Republican party slogan or designation, "Republicans for Responsible Government." In some counties, such as Bergen County where this case originated, the party hierarchy's power is reinforced when the party's chairman dons a second hat and is appointed county campaign chairman.[6] The statute renders the second class candidates powerless since they are not provided a hearing or forum in which to challenge or debate their classification.

The Petitioner submits that by its application, this statute becomes the political party's tool of exclusion rather than inclusion and disassociation rather than association. Simply put, second class candidates are denied their right to associate with Republicans who could in fact be of like philosophy. Furthermore, the sample ballot which is controlled by the campaign manager is mailed to every registered voter and becomes nothing more or less than a political flyer, paid for by the taxpayers, and used by county campaign managers to announce to the electorate their endorsements of anointed candidates. The sample ballot and voting machine ballot brand all candidates that are not hand-picked by the county campaign managers as second class Republicans.

N.J.S.A. 19: 49-2 deprives candidates of valuable

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[6] See *N.J.S.A.* 19:34-52 which prohibits a political party's county committee from endorsing candidates prior to a Primary Election, and *Cavanagh v. Morris*, 121 *N.J. Super.* 430 (1972), a case which is factually analogous to the instant case wherein the court looked at the by-laws of the party organization and held that the county committee (or party) chairman who also wore the county campaign manager's hat, was, in fact, the alter ego of the county committee chairman, and as such violated *N.J.S.A.* 19:34-52 which prohibits a party's county committee from endorsing candidates *prior* to a Primary Election.

property (in the form of first class column position and designation) without due process in violation of the Fourteenth Amendment. It is a "position-biased" and "designation-biased" statute which gives candidates who have the ear of the county campaign manager an unfair advantage in the Primary Election.[7] It gives absolute power to one person, the county campaign manager, who then decides who will represent the Republican Party in a Primary Election. His power includes the power to classify everyone from a national presidential candidate down to a small town municipal council candidate.[8] The campaign manager is not responsible to a constituency. He is not voted into power. He is appointed by the county candidates who have yet to be elected to office. Even so, the county campaign manager decides who is fit to be called a "Republican for Responsible Government," i.e. a true Republican, one that is selected and endorsed by the Republican Party. He is given complete control over the

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[7] Over the past half- century political scientists and statisticians have proven time and time again that ballot position and special designations (including slogans) give candidates a statistical advantage in an election (5 to 61%). Position and designations serve as cues for the "donkey" voter, i.e., the uninformed party voter who has no opinion about the qualifications of candidates and votes the first name on the ballot. *The Effect of the "Donkey" Vote on the House of Representatives*, 10 *Aus. J. of Pol and History*, 221, 225 (1964); *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. *Calif. L. Rev.* 365 (1972). See also *Kautenburger v. Jackson*, 333 *P.2d* 293, 295 (1958), which took judicial notice that "it is commonly known and accepted fact that where there are a number of candidates for the same office, the names appearing at the head of the list [on the ballot] have a distinct advantage."

[8] The statute also allows the county campaign manager, i.e. the county committee chairman, to create an organization of loyal, beholding county committee members to perpetuate his reign, inasmuch as the chairman has the power to grant the preferred column one position and the party slogan to candidates for county committee membership!

Primary Election ballots -- subject only to the discretion given to the County Clerk (who in this case is not a disinterested party),[9] who formats the Primary ballot layouts for the printers and programmers of the voting machines. The County Clerk, exercising her broad discretionary power, begins her ballot design by awarding the slate of county candidates the preferred "column one" position. She then (at the direction of the campaign manager/party chairman) removes all second class candidates who may have won this position by luck of a blind drawing pursuant to *N.J.S.A.* 19:23-24 and strips from them the party designation that they may have won pursuant to *N.J.S.A.* 19:23-18.[10]

The Petitioner submits to this court that *N.J.S.A.* 19:49-2 affects voter rights. The voters have the right to expect their party to lead rather than mislead. There is no question that voters presume that the party endorsement is predicated upon the campaign manager's knowledge of the candidates' qualifications and political philosophy -- when in fact, no hearing or forum is available to a candidate to present this information and no attempt is made by the campaign manager

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[9] Respondent County Clerk was the incumbant candidate in the instant Primary Election. She was a member of the county slate which appointed Respondent County Committee Chairman to the position of county campaign manager. She ran in the preferred column one position with the party designation. Although an attorney and an officer of the court, she ignored the holding of *Millman v. Kelly*, 171 *N.J. Super.* 589 (1979), which prohibits a County Clerk from using the sample Primary ballot and the actual ballot as an advertisement of incumbency. She is the only candidate on the ballot mentioned *three times*. (Lodged as B).

[10] It should be noted that at trial the former president of the New Jersey State Association of Municipal Clerks testified that he still gave courses to other municipal clerks, instructing them pursuant to *N.J.S.A.* 19:23-24 and 19:23-18, to hold drawings for column position and certify candidates who were first to file for designation preference pursuant to these statutes despite the seeming conflict of *N.J.S.A.* 19:49-2.

to gather it. And most importantly, *N.J.S.A.* 19:49-2 does not mandate a forum for the candidate.

The Petitioner therefore submits that the same statute that affects the candidate, also affects the right of voters and is therefore the proper object of the "strict scrutiny" standard.

N.J.S.A. 19:49-2 gives the party's county campaign manager *two* opportunities to influence the Primary Election. The first comes when every registered voter is mailed a "sample ballot" which indicates by ballot position and designation the party's endorsed candidates. The second opportunity comes when the voter enters the voting machine and is cued by the ballot to vote for the party's choices.

In conclusion, the Petitioner submits that *N.J.S.A.* 19-49-2 perverts the very essence of the Federal Constitution. It allows a government that was created "by people and for the people" to evolve into one that is politically recreated *by the parties for the parties.*

POINT II THE PETITIONER DOES NOT REQUEST THAT HER PETITION BE TREATED AS AN EXTRAORDINARY WRIT BUT THAT THIS COURT ADDRESS CONSTITUTIONAL ISSUES WHICH LOWER COURTS HAVE HERETOFORE DECLINED TO ADDRESS AND CONTINUE TO EVADE REVIEW.

Respondent in Point II of his brief argues that the Petitioner's did not properly file for an extraordinary writ and should not be granted one.

The Petitioner is not asking for an extraordinary writ.

In Point I the Petitioner submits to the Court that unless the constitutional issues in her petitioner are addressed, the Petitioner will continue to suffer injuries of the same or similar nature inasmuch as she intends to run again for council in the 1999 Primary. To date, the statutes involved in this case

continue in full force and have not been legislatively repealed or modified -- and although candidates have continued to be injured by its application, the full spectrum of constitutional issues surrounding the application of N.J.S.A. 19:49-2 have successfully evaded review with only minor exceptions.

In Points II and III, the Petitioner elaborates on the argument that she "fits the profile" of an injured party who qualified for emergent relief in the New Jersey courts but was denied that relief without opinion. The Petitioner is therefore, in essence, appealing to this Court as a "court of last resort" in an effort to -- and at the very least -- put a halt to the injuries to candidates and voters who rely upon courts to protect their fundamental rights against legislative and executive attack.

POINT III RESPONDENT DID NOT PRESENT PROOFS AT TRIAL TO SUSTAIN THE ALLEGATIONS OF WAIVER, ESTOPPEL, AND LACHES AND THEY ARE THEREFORE INAPPLICABLE TO THE INSTANT CASE.

The above doctrines are defined in *In re: CAFRA PERMIT NO. 87-10959-5*, 290 *N.J. Super.* 498 (1996). The CAFRA court defined "laches," *supra* at 510, as "the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." The record speaks for itself. The Petitioner filed suit within the time limitation prescribed. The court defined "equitable estoppel," *supra*, as "the effect of the voluntary conduct of a party whereby the party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse." The Respondent failed to present evidence to the trial court that the Petitioner had committed any act which caused the

Respondent to change his position for the worse. And lastly the CAFRA Court defined "waiver," *supra*, as "the intentional relinquishment of a known right." The Respondent failed to present evidence of waiver. In short, the Respondent failed to support his allegations with any evidence whatsoever.

POINT IV THE ISSUES AND THE CONSTITUTIONAL VALIDITY OF N.J.S.A. 19:49-2 ARE NOT CONTROLLED BY *QUAREMBA V. ALLAN*, 67 *N.J.* 1 (1975).

In Point IV of the Respondent's brief, Respondent relied upon a case that can be distinguished on the facts from the one before this Court. But more importantly, in 1974 the State Supreme Court did not have the holding of *Anderson v. Celebrezze*, 460 *U.S.* 780 (1983) to guide their reasoning. Furthermore the issues were significantly different.

In 1974 New Jersey still employed paper ballots in six counties. The Plaintiffs challenged the constitutionality of N.J.S.A. 19:49:2, alleging that it (1) creates preferred classes of Primary candidates; (2) favors candidates and voters in rural counties which use paper ballots * * * over candidates and voters in populous counties which use voting machines; (3) favors candidates in counties using voting machines * * * who file a joint petition and those who affiliate with them * * * over all other candidates; and (4) imposes an unequal burden on unaffiliated candidates and thus denies them their constitutional rights.

The *Quaremba* Court held N.J.S.A. 19:49-2 was constitutional, reasoning that the legislature may adopt such regulations that "may control the manner of preparation of the ballot, so long as they do not prevent a qualified elector from exercising his constitutional right to vote for any person he chooses." The Court went on to say, "Even if we were to

disregard the presumption of validity which attaches to N.J.S.A.19:49-2, it is clear that it is not invidiously discriminatory." ". . . one must assume the Legislature intended a ballot so arranged that all voters may find their candidates with the least difficulty the total content of the ballot will permit." *Id.* Furthermore "the public interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates to have this fact brought to the attention of the voter in a Primary election with the additional effectiveness produced by alignment of their names on the machine ballot." *Id.*

In the instant case, the Petitioner is challenging the legislatively unbridled power placed in the hands of a single individual by *N.J.S.A.* 19:49-2 and the issues raised in Point I of this brief -- as well as bringing to the attention of this Court that no compelling State reason had been briefed by the Respondent which can stand the "strict scrutiny" test demanded by the facts in this case.

POINT V **N.J.S.A. 19:34-52 CAN WITHSTAND A CONSTITUTIONAL CHALLENGE GIVEN A COMPELLING STATE REASON FOR BURDENING A FUNDAMENTAL RIGHT.**

The Respondent in Point VII, states that a statute which prohibits the endorsement of candidates by political organizations has been found to violate the First Amendment right of those organizations -- therefore N.J.S.A 19:34-52 is unconstitutional. The Respondent relies upon *San Francisco County Democratic Central Committee, et al v. March Fong Eu*, 826 *F.2d* 814 (9th Cir. 1987).

The Petitioner submits to this Court that when the *Eu* case reached this Court, the Justices opened the door to further challenges of this type of statute. This Court held that

"The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their members *without serving a compelling State interest.*" *San Francisco County Democratic Central Committee, et al v. March Fong Eu*, 489 *U.S.* 214 (1989).

The Petitioner regrets that the State, although a party in the instant case, has declined to participate in these proceedings and is not raising the obvious compelling interests of the State in preventing a political party from endorsing candidates prior to a Primary Election.

POINT VI PETITIONER IS NOT ATTACKING THE PRESUMPTION OF VALIDITY OF THE ACTIONS OF RESPONDENTS.

The Respondent in Point VII mistakenly repels an illusory attack. The Petitioner agrees with the Respondent that the actions of the County Clerk and Republican County Committee Chairman, a/k/a county campaign manager, were taken in good faith and in reliance upon the New Jersey statutes as they are written. The purpose of this Petition is to challenge the constitutional validity of N.J.S.A. 19:49-2 as written and applied, not to attack those public servants who faithfully carry out legislative mandates (however flawed) to the best of their respective abilities.

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: February 16, 1999